No. 85-634

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

ELLEN W. KIRCHNER,

Petitioner,

vs.

FRED A. KIRCHNER,

Respondent.

On Writ Of Certiorari to the Florida District Court of Appeal, Third District

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

DOES SERVICE OF PROCESS WITHIN STATE BOUNDARIES CREATE IN PERSONAM JURISDICTION OVER A NON-RESIDENT DEFENDANT OR ARE DUE PROCESS "MINIMUM CONTACTS" NECESSARY IN ALL ASSERTIONS OF STATE COURT JURISDICTION OVER NON-RESIDENTS?

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SUMMARY OF THE ARGUMENT

The Petitioner argues that by virtue of the decision in *Shaffer v. Heitner,* "minimum contacts" are required to create in personam jurisdiction over a non-resident defendant even where the non-resident defendant was personally served with process within the forum state. *Shaffer v. Heitner,* however, dealt with "long arm" service and not with personal service within the territory of the state. Furthermore, *Shaffer v. Heitner* concluded that assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* which standards, by the express language of *International Shoe,* are applicable to service upon a defendant "if he be not present within the territory of the forum". Thus, *Shaffer v. Heitner* does not apply where, as here, the defendant is personally served within the forum state.

The Respondent respectfully submits that presence within a state, even temporary or transitory presence, is still a common law basis of state court jurisdiction unchanged by this Court's decision in *Shaffer v. Heitner.*

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ARGUMENT

Service Of Process Within State Boundaries Creates In Personam Jurisdiction Over A Non-Resident Defendant

The Petitioner, ELLEN W. KIRCHNER, was personally served with process within the state of Florida. The Florida trial court and District Court of Appeal both de-

termined that such service of process was sufficient to create in personam jurisdiction. This determination is in accordance with previous Florida case law. See, e.g., *Wolfson v. Wolfson,* 455 So.2d 577 (Fla. 4th DCA 1984), "still alive and well is the traditional principle that proper service on a person found within the territory of the state effects in personam jurisdiction when the person is present voluntarily, not because of fraud or trick, and not to appear in court on an unrelated matter". ELLEN KIRCHNER now seeks review in this Court alleging, alternatively, that the Florida courts, "in company with many other state courts", have "wrongfully decided" a constitutional issue or that such decision is in conflict with *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). The Petitioner's assertions, however, are faulty in two respects. First, *Shaffer v. Heitner* involved "long arm service" upon non-resident defendants. *Shaffer v. Heitner* did not involve personal service of process upon a non-resident defendant located within the state as occurred herein. As such, there can be no conflict between this case and *Shaffer v. Heitner* because the two cases involve materially different facts. A conflict cannot arise between two cases which do not involve substantially the same controlling facts and, as was noted in *Oxmans' Erwin Meat Co. v. Blacketer,* 86 Wis. 2d 683, 273 N.W.2d 285 (1979):

> Neither *International Shoe* nor its progeny, including the recent case of *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), addresses the issue of the constitutionality of the state's exercising jurisdiction based solely on the service of process upon an individual physically present within state borders.
>
> *Oxmans' Erwin Meat Co. v. Blacketer,* 86 Wis. 2d 683, 685, 273 N.W.2d 285, 287 (1979).

Second, the Florida courts have not "wrongfully decided a constitutional issue" because the decision of this Court in *Shaffer v. Heitner* clearly indicates that personal service upon a non-resident defendant within a state continues to create in personam jurisdiction over the defendant.

In *Shaffer v. Heitner* this Court stated:

> We therefore conclude that all assertions of state court jurisdiction must be evaluated *according to the standards set forth in International Shoe and its progeny.*
>
> *Shaffer v. Heitner,* 433 U.S. 186, 212, 97 S.Ct. 2569, 2584, 53 L.Ed.2d 683, 703 (1977) (Emphasis added).

The "standards set forth in *International Shoe*" are:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, *if he be not present within the territory of the forum,* he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice".
>
> *International Shoe Co. v. State of Washington,* 326 U.S. 310, 314, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (Emphasis added).

It is, therefore, clear that the "all assertions of state court jurisdiction" language in *Shaffer v. Heitner* applies only to assertions of state court jurisdiction in which "long arm" or substituted service is attempted and not to assertions of state court jurisdiction where the defendant is personally served with process while voluntarily present within the territory of the forum.

Presence within a state, even temporary or transitory presence, is still a common law basis instilling competence in the courts of that state to adjudicate claims against the person. See, e.g., *Leab v. Streit,* 584 F.Supp. 748 (S.D. N.Y. 1984). In *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) this Court made the following statement:

> Personal service of written notice within the jurisdiction is the classic form of notice *always* adequate in any type of proceeding.
>
> *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) (Emphasis added).

It has long been the law that personal service within a state's geographical area establishes its court's personal jurisdiction over the defendant. *Shaffer v. Heitner* does not change this well established basis of jurisdiction. The cases relied upon by the Petitioner in discussing "fairness" and "due process" are directed either to the fairness of the basis for *substituted service* when an individual was *not* personally served or present within the area, or to the fairness of subjecting a foreign corporation to the jurisdiction of the court. See, e.g., *Donald Manter Company, Inc. v. Davis,* 543 F.2d 419 (1st Cir. 1976); *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 1283 (1958); *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). Further, in the only post-*Shaffer* case in which a court had the opportunity to determine the application of *Shaffer v. Heitner* to a case involving personal service within the forum, the court declined to so do:

> In our view the United States Supreme Court has not imposed a "minimum contacts" requirement on a state's assertion of jurisdiction over a natural person

upon whom personal service within the state has been achieved.

Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis.2d 683, 685, 273 N.W. 2d 285, 287 (1979).

CONCLUSION

The Respondent respectfully submits that the Petitioner has failed to show a conflict between the decision herein and this Court's decision in *Shaffer v. Heitner* inasmuch as the two cases are substantially factually dissimilar and, therefore, it cannot be said that any particular rule of law enunciated in *Shaffer v. Heitner* applies under the distinctively different factual circumstances herein. Further, it also cannot be said that the Florida courts have "wrongfully decided an important constitutional issue" because this Court did not impose the *Shaffer v. Heitner* "minimum contacts" requirement upon a state's assertion of jurisdiction over a person personally served within the state.

WHEREFORE, the Respondent respectfully requests that the Supreme Court of the United States deny the Petition for Certiorari.

Respectfully submitted,

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